

Issue: Group I Written Notice (misuse of leave time); Hearing Date: September 7, 2001; Decision Date: September 10, 2001; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5268



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5268

Hearing Date: September 7, 2001
Decision Issued: September 10, 2001

PROCEDURAL HISTORY

On June 5, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

[Grievant] called me on 5-27-01 in the late afternoon to tell me he would not be able to work his holiday shift on 5-28-01 due to an appointment for his wife that day. [Grievant] was told by me that no one could get an appointment on a holiday and not to return without a doctor's note. Doctor's note [was] not adequate. Group Offense: Unsatisfactory Attendance.

On June 27, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 14, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 7, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

Agency Party Designee
Agency Representative
Supervisor

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections employs Grievant as a Power Plant Supervisor.

On Sunday, May 27, 2001, Grievant took his wife to the hospital Emer14.2(i)4.2((W)octu6

require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15.

Grievant denies ever telling the Supervisor that his wife had a doctor’s appointment on May 28. He says he mentioned his wife had an appointment but did not specify which day.

The burden of proof is on the Agency to prove by a preponderance of the evidence that the disciplinary action should be upheld. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence does not mean absolute certainty.¹ The Supervisor’s testimony was very credible. If Grievant did not say his wife had a doctor’s appointment on May 28, Grievant had the opportunity to correct the Supervisor when the Supervisor spoke with Grievant a second time. Grievant’s failure to counter the Supervisor’s assertion suggests the Supervisor’s assertion was correct. Grievant had not offered any explanation as to why the Supervisor would not be capable of understanding Grievant’s comments or why the Supervisor may have intentionally misstate his conversation with Grievant. For these reasons, the Agency has met its burden of proof.

Misrepresenting the need for sick leave constitutes inadequate or unsatisfactory job performance thereby justifying the Agency in issuing a Group I Written Notice. DOCPM § 5-10.15(B)(1). No evidence was presented suggesting mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly

¹ A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific

Hearing Officer